BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion and modified opinion in the Circuit Court of Appeals for the Seventh Circuit are set forth in the transcript of record filed in this cause at pages 928 and 966 thereof.

The revised and substituted report of the Master in Chancery, to whom the cause was referred by the District Court, appears in the transcript of record at pages 856 to 882 thereof.

The decree entered in the District Court, adopting, approving and confirming the revised and substituted report of the Master, appears in the transcript of record at page 900 thereof.

The opinion rendered in the District Court in the form of a Memorandum appears in the transcript of record in case No. 7481 at pages 114 to 121 thereof.

JURISDICTIONAL GROUNDS.

The jurisdiction of this court is invoked by virtue of the provisions of Section 240(a) of the Judicial Code, as Amended, by the Act of February 13, 1925, Chapter 229, 43 Stat. 936, entitled, "An Act to amend the Judicial Code and to further define the jurisdiction of the Circuit

Court of Appeals and the Supreme Court, and for other purposes."

The United States Circuit Court of Appeals for the Seventh Circuit on February 28, 1941, reversed the order or decree of the District Court of the United States for the Northern District of Illinois, Eastern Division. (R. 946)

A petition for rehearing was filed on March 14, 1941, within the time allowed under the provisions of Rule 22 of the United States Circuit Court of Appeals for the Seventh Circuit. (R. 948)

On the 7th day of April, 1941, the Circuit Court of Appeals for the Seventh District entered an order denying said petition for rehearing and by said order modified the opinion theretofore filed by the court. (R. 966) The certified transcript of record, the petition for the issuance of a writ of certiorari with supporting brief annexed thereto are filed herein with the Clerk of this court within three months after denial of the said petition for rehearing in the United States Circuit Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE.

The essential facts in the case at bar are set forth in the preceding Petition for a Writ of Certiorari under Point I thereof, and in the interest of brevity are hereby readopted and made a part of this brief.

SPECIFICATION OF ASSIGNED ERRORS.

The Circuit Court of Appeals for the Seventh Circuit erred:

1 (a). In holding that the act of April 22, 1899 (Appendix "A") authorized a municipality to create two water funds by allocating to each some portion of an existing water fund, notwithstanding that the existing water fund had been theretofore pledged under the terms and provisions of a contract ordinance and in spite of positive statutory provisions that the existing water fund was to be held inviolate for the purpose for which it was created and for no other purpose whatsoever.

(b) In holding that such an allocation does not contravene the provisions of Article 2, Section 14 of the Constitution of the State of Illinois, and does not contravene the provision of Article 1, Section 10 of the Constitution of the United States.

2. In holding that said Act of April 22, 1899, authorizes a municipality to acquire two or more water works "systems".

SUMMARY OF ARGUMENT.

I.

The authority for the City of Harvey to acquire two water systems and to create two water funds must be found in some Act of the General Assembly or it does not exist.

(a) Municipalities derive their existence and their powers solely from the General Assembly.

(b) Statutes which grant powers to municipal corporations, are strictly construed, and any fair or reasonable doubt of the existence of such powers is resolved against the municipality which claims the right to exercise them.

(c) Under the Act of April 22, 1899, the General Assembly provided the method whereunder the City of Harvey might enter into a contract for the acquisition of a water works system and the manner whereby it might issue water certificates of indebtedness and provide for the payment thereof. That method is exclusive and must be followed. If it is not observed, the contract is invalid and unenforceable.

II.

A city cannot be estopped to deny the validity of a contract which it had no power to make, as a city cannot be given power to do unauthorized acts simply because it has done them and received the benefits.

ARGUMENT.

I.

The authority for the City of Harvey to acquire two water systems and to create two water funds must be found in some Act of the General Assembly or it does not exist.

The City Council of the City of Harvey, on August 4, 1924, passed Ordinance No. 852 "authorizing the City of Harvey to purchase the water distribution system and appurtenances of the Public Service Company of Northern Illinois for furnishing water in the City of Harvey, Illinois, and to provide for the cost thereof." (R. 684) Said ordinance was passed under and in accordance with an act of the General Assembly of the State of Illinois (R. 684) entitled "An Act authorizing cities, towns and villages to build, purchase or extend waterworks systems for public and domestic use, and to provide for the cost thereof," approved April 22, 1899, in force July 1, 1899. (Appendix "A")

By virtue of the ordinance of August 4, 1924, the City of Harvey availed itself of the provisions of said act of 1899, acquired its waterworks system from the Public Service Company of Northern Illinois, issued water certificates of indebtedness in payment therefor in the sum of $200,000.00 and created a "water fund". In adopting said Ordinance No. 852 the City of Harvey exercised all of the powers which the General Assembly of the State of Illinois, by said act of April 22, 1899, had conferred upon it. The City of Harvey was then under the legisla-

tive commandment that "the entire proceeds arising from the waterworks system shall be paid into a *fund* to be known as the 'Water Fund', and which *fund* shall be and remain *inviolate* until the certificates issued under the terms hereof and the interest thereon *is* fully paid". (Section 3, Act of 1899, Appendix "A") (Italics added)

The City of Harvey two years later and on the 20th day of September, 1926, passed an ordinance, entitled "Ordinance No. 954, approving plans for the construction of a waterworks system for public and domestic use in the City of Harvey, Cook County, Illinois, to be paid for by certificates of indebtedness limited in their payment solely to the water fund hereinafter provided for, and fixing the rate at which water is to be supplied therefrom". (R. 516)

Section 6 of said Ordinance No. 954 provides in part as follows (R. 520):

> "The total receipts of the City of Harvey from its present water distribution system and from its said Waterworks System No. 2 to be constructed as an extension of the present system shall be allocated to its Special Water Fund No. 1 and said Special Water Fund No. 2 in the proportion of the water supplied by each of said systems, as determined by the intake meters at the points at which each of said plants receive from the City of Chicago the supply of water distributed through the mains of each of said systems."

By the terms of said ordinance the City of Harvey undertook to allocate or assign some part of the funds arising from its present water distribution system to the payment of certificates which were to be issued to meet the costs of constructing Water Works System No. 2. The attempt to allocate any part of the revenues arising from the City's existing water distribution system was a violation of the legislative prohibition contained in said

Section 3 of the Act of April 22, 1899; it was an impairment of the contract obligation contained in Section 4 of said ordinance No. 852 whereunder Public Service Co. of Northern Illinois was given until fully paid a vested interest in the entire proceeds arising from the operation of the water distribution system which it had sold and transferred to the City of Harvey.

Article 2, Section 14, Constitution for State of Illinois.

Article 1, Section 10, Constitution of the United States.

Somewhere in the act of 1899 there must be found express language giving the municipality the power to create two water funds or to allocate revenues from one fund to another or the power does not exist.

A municipality must follow the manner provided by the legislature in issuing water certificates. This manner is exclusive and if it is not followed the contract is void and unenforcible. In the case of *City of Carlyle* v. *Nicolay,* 333 Ill. 562, at page 568 the Court says:

> "It is a general rule that when the legislature grants to a municipal corporation power to do any act and prescribes the manner in which the power shall be exercised, the power must be exercised in the manner stated in the grant and not otherwise."

It is a well established principle of law that grants of powers to municipalities are to be strictly construed. The Supreme Court in the case of *Coquard* v. *Village of Oquawks,* 192 Ill. 355, at page 365, says:

> "This court, as well as the Supreme Court of the United States, has quoted with approval the rule laid down by Judge Dillon, in his work on municipal corporations, 'That a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words;

> second, those necessarily or fairly implied, in or incidental to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.' (Cases there cited.) Any reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied."

It has been said by the Circuit Court of Appeals in this case:

> "Nor did the attempted allocation of the earnings from the two plants work any violation of the Act."

It is a fundamental principle of law that in construing statutes, words are to be given their usual and accepted meaning. Allocation, according to Webster's New International Dictionary, Second Edition, means: (1) "Act of putting one thing to another." Under this definition, if the revenues derived from the existing system are put to the payment of the certificates of the so-called water system No. 2, then the "water fund," did not "remain inviolate, until the certificates issued under the terms thereof were fully paid," as the Statute provides. (Sec. 3, Appendix)

The ordinance, attempting the aforesaid allocation, purports to be adopted in pursuance of the Act of April 22, 1899, and other acts of the State of Illinois pertinent to the subject matter. (R. 516)

Respondent fails to point out any act of the General Assembly of the State of Illinois, which authorized the construction of Water Works System No. 2.

The Circuit Court of Appeals in this case, in its opinion, states:

> "The act of July 8, 1927, which expressly provided for allocation of earnings of different systems, it

> seems to us, does not militate against the validity of these certificates under the act of 1899. The latter act did not repeal the first; it only created additional and more facile methods."

The court obviously overlooks the fact that the act of July 8, 1927, was not in existence on September 20, 1926, at the time of the attempted allocation, nor at the time of the issuance of the water certificates, payable out of the so-called Special Water Fund No. 2. It is not a validating nor curative act, nor could it be for the Supreme Court of the State of Illinois, in the case of *The People* v. *Orvis,* 374 Ill. 536 at 541, says:

> "It is settled that the General Assembly may, by statute, validate an irregular or defective exercise of a power where the power already existed and the proceeding sought to be cured was not one of the fundamentals of the power exercised. Conversely, the General Assembly cannot, by a curative act, make a void proceeding valid. (*People* v. *Southern Railway Co.,* 367 Ill. 389; *People* v. *Chicago and Eastern Illinois Railway Co.,* 365 *id.* 202; *People* v. *Padley,* 340 *id.* 314; *People* v. *Chicago, Milwaukee and St. Paul Railway Co.,* 321 *id.* 499; *Maulding* v. *Skillet Fork Drainage District,* 313 *id.* 216; *Roverts* v. *Eyman,* 304 *id.* 413.)"

The Circuit Court also says in its opinion (R. 942):

> "But the act authorizes cities to build, purchase or extend waterworks 'systems'. It does not forbid more than one system, but strongly suggests power to build, enlarge and pay for more than one system. It contemplates purchase or construction of a plant and in addition, extension or enlargement thereof, and expressly authorizes the city, in payment of the cost of such building, enlargement or extension, to issue water fund certificates, payable out of the proceeds arising from the operation."

The act of April 2, 1899, Section 1 thereof, provides as follows:

> "Every city, incorporated town and village in this State, is hereby authorized to acquire water works for supplying water for public use, and for domestic use of its inhabitants by building *or* purchasing a *water works system or* enlarging *or* extending *an existing system.* * * *" (Italics added.)

The court in its opinion misapprehends the language of the act of 1899 and applies the act as though the word system appears in the plural, whereas in fact, the word system appears in the singular throughout the body of the act, and appears in the plural only in the title of the act, where the words "cities, villages and towns" appear in the plural.

The application of the act of 1899, as though the word "system" appeared in the plural in the body of the act, led the court into the erroneous conclusion that said act of 1899 permitted two or more water "systems" and two or more issues of certificates to co-exist and that the "water fund" declared by the act to be inviolate might be divided and used for a purpose not contemplated by the ordinance creating the "water fund".

II.

A city cannot be estopped to deny the validity of a contract which it had no power to make, as a city cannot be given power to do unauthorized acts simply because it has done them and received the benefits.

The Master and Chancellor in this case held that the City of Harvey was estopped to deny the validity of water fund certificates #2, based upon the fact that said city had made frequent payments on both the principal

and the interest coupons of said certificates. The petitioner contends that a municipality is a creature of the legislature; that it possesses only those powers which the legislature conferred upon it, and that where a municipality lacks the power to perform the act sought to be done, it can not be estopped to deny the validity of that act regardless of the subsequent conduct or acts of such municipality.

The case of *City of Corpus Christi* v. *Hayward,* 111 F. (2d) 637, and *Bolton* v. *Wharton,* 163 S. C. 242; 86 A. L. R. 1101, sustain the contention that a municipality can not be estopped to deny the validity of an act which it had no power from the legislature to perform, regardless of what was done by the municipality subsequently thereto. The court in the *Bolton* case, says:

> "Nor did the city, either by the payment of interest or of a small amount on the principal of the originals, ratify the instant obligations. *Feldman* v. *City Council of Charleston* (1885), 23 S. C. 57, 69, 70, 55 Am. Rep. 15, seems decisive of this point against the defendant holder. There, the City of Charleston by an ordinance, which was subsequently ratified by the Legislature, issued its bonds to secure funds to lend to landowners, whose property had been damaged during a fire which swept the city. Thereafter the city made payments on such bonds. Held, since bonds were issued for no corporate purpose, there could be no estoppel against the city by virtue of part payment. Neither can the payment of interest, even if of long continuance, upon bonds of a municipality validate them by ratification or estoppel. (*Clarke* v. *Northampton* (C. C. A. N. Y. 1903), 120 F. 661, 57 C. C. A. 125, certiorari denied 189 U. S. 513, 23 S. Ct. 852, 47 L. Ed. 924; note L. R. A. 1915A, 11); nor renewals of an invalid obligation translate it into a valid one (*Luther* v. *Wheeler, supra*)." 163 S. C. 242; 86 A. L. R. 1101.

The petitioner City of Harvey denied the validity of water certificates of indebtedness #2 because it lacked the power to issue them. Neither the Master nor the Chancellor made a finding as to the validity or invalidity of said certificates, but made a finding only that the City was estopped to deny them by reason of its subsequent conduct in making principal and interest payments. The Circuit Court of Appeals for the Seventh Circuit affirms this view.

The petitioner respectfully submits that a Writ of Certiorari should be granted in order that this court may review the judgment of the Circuit Court of Appeals in the exercise of its supervisory powers.

Respectfully submitted,

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